

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-470

In re Applications of

F.E.M. RAY, INC. File No. BPH-870515NL

PLAYA DEL SOL File No. BPH-870515NX
BROADCASTERS

For a Construction Permit
for a New FM Station,
Channel 281A in Tucson, Arizona

MEMORANDUM OPINION AND ORDER

Adopted: January 21, 1992; Released: January 27, 1992

By the Commission:

I. INTRODUCTION

1. Before the Commission for consideration is a Review Board decision, *F.E.M. Ray, Inc.*, 6 FCC Rcd 4238 (Rev. Bd. 1991), granting the application of F.E.M. Ray, Inc. (FEM Ray) for a new FM radio station in Tucson, Arizona, and denying the mutually exclusive application of Playa Del Sol Broadcasters (Playa). *See also, F.E.M. Ray, Inc.*, 6 FCC Rcd 573 (I.D. 1991). We agree with the Board's resolution of this case. We wish, however, to comment on certain matters.¹

II. BACKGROUND

2. The Board, affirming an initial decision by Administrative Law Judge Edward J. Kuhlmann, granted the application of FEM Ray, finding it comparatively superior to the application of Playa based on the integration and diversification criteria. FEM Ray proposes integration of all its voting stockholders and has no media interests, whereas Playa's sole principal, Edward Stolz, proposes no integration and has media interests. The Board rejected Playa's contentions that it was entitled to dispositive comparative credit for its superior coverage area and Stolz's purportedly superior broadcast record as the owner of KWOD(FM) in Sacramento, California.² The Board held that, even if Playa were awarded comparative credit on these bases, it could not prevail over FEM Ray. Therefore, the Board concluded that FEM Ray was the comparatively superior applicant. *F.E.M. Ray*, 6 FCC Rcd at 4238 ¶ 5.

3. The Board also rejected Playa's contention that financial, misrepresentation, lack of candor and reporting issues should be added against FEM Ray. The Board found that Playa failed to raise substantial and material questions of fact sufficient to enlarge the issues against FEM Ray. Specifically, the Board found that the record does not support Playa's claims that FEM Ray relied on Greg

Cutchall as its primary source of funding, that FEM Ray became financially unqualified because Cutchall's loan commitment is no longer valid, and that FEM Ray failed to report the loss of its financing pursuant to 47 C.F.R. § 1.65. The Board found that FEM Ray has reasonable assurance of committed funding to construct and operate the proposed station and therefore is financially qualified. 6 FCC Rcd at 4238 ¶ 7, 4239-40 ¶¶ 8-9.

III. FEM RAY'S FINANCIAL PROPOSAL

4. Playa argues that the Board erred by refusing to add the requested issues against FEM Ray. Playa again contends that FEM Ray's financial certification was primarily based on a loan from Greg Cutchall, who later could not meet court ordered payments in a divorce proceeding. Furthermore, Playa contends that FEM Ray principal Francine Rienstra admitted that it was necessary to replace Cutchall's loan in order to maintain FEM Ray's financial qualifications, raising questions as to whether or for how long FEM Ray was financially unqualified before it took steps to secure replacement funding. Playa also asserts that FEM Ray's failure to report these matters to the Commission requires the addition of candor and reporting issues.

5. We agree with the Board that Playa has failed to meet its burden of making a *prima facie* showing in order to justify the addition of financial, misrepresentation and candor issues against FEM Ray. *See e.g., Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 ¶ 7 (1989). Playa's contentions are based on speculation. Playa has failed to make specific allegations of fact, supported by affidavits, sufficient to warrant the addition of issues. *See Schwier*, 4 FCC Rcd at 2660 ¶ 7.

6. Although Playa does not contend that FEM Ray was unqualified when it made its financial certification, Playa asserts, based on its reading of Rienstra's hearing testimony and declarations, that FEM Ray relied on Cutchall's loan to certify its financial qualifications and that it was necessary to replace this loan commitment in order to maintain FEM Ray's financial qualifications. However, contrary to Playa's assertion, Rienstra's declarations state that FEM Ray certified its financial qualifications based on funds committed by its stockholders exceeding its costs by approximately \$18,000. *See Rienstra declarations*, May 23, 1990, ¶ 3; July 18, 1990, ¶¶ 2-3. According to Rienstra, Cutchall's loan commitment was a cushion, in the event that the station required additional funding in order to operate after the initial three month period covered by its certification. Rienstra declaration, May 23, 1990, ¶ 3. The pages of the hearing transcript cited by Playa are consistent with Rienstra's declarations, merely attesting that Cutchall's loan commitment is still viable and that another individual has also made a loan commitment to FEM Ray. Tr. at 894-95. Playa has not made any showing to refute these assertions. Contrary to Playa's speculation, the fact that FEM Ray secured a new loan does not demonstrate that Cutchall's loan was the primary basis of FEM Ray's financial certification.

7. Additionally, even assuming that Cutchall's loan commitment is now required to maintain its financial qualifications, Playa fails to show that Cutchall is unable to meet his loan commitment. Although, as Playa observes, Cutchall did not make the payments ordered in his divorce proceeding, Playa provides no evidence as to why he did not do so or otherwise demonstrate the relevance

of that circumstance to this proceeding. In this regard, the fact that FEM Ray obtained an additional loan commitment does not imply that FEM Ray otherwise lacked adequate financing. Playa's contentions to the contrary are mere speculation.³

IV. ORDER

8. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed August 14, 1991 by Playa del Sol Broadcasters IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

¹ Now before the Commission are an application for review filed August 14, 1991 by Playa and an opposition filed August 21, 1991 by FEM Ray. In its opposition, FEM Ray seeks expedited consideration of Playa's application for review. We note that the Commission has committed itself to expeditious consideration of applications for review in routine adjudicatory proceedings and thus we have acted accordingly in this case. See *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 164 ¶ 50 (1990).

² Specifically, the Board found that Playa is entitled only to a very slight to slight preference for its proposed greater coverage area, since, as Playa concedes, both applicants will provide new service to areas and populations that already receive five or more aural services. The Board also found that Playa would not be entitled to full credit for Stolz's broadcast record even if it were deemed superior, since Stolz does not propose to be integrated into the day-to-day management of the Tucson station. 6 FCC Rcd at 4238 ¶ 4. We agree with the Board. See *Omaha TV 15, Inc.*, 4 FCC Rcd 730, 735 ¶ 38 (1989). Therefore, there is no relevance in Playa's present contentions that the Commission should take official notice of the finding in the KWOD(FM) comparative renewal proceeding, *Royce International Broadcasting*, 4 FCC Rcd 7139, 7142-44 (Rev. Bd. 1989)(subsequent history omitted), that Stolz had an exemplary broadcast record and that this circumstance should be treated as a threshold showing sufficient to entitle Playa to claim comparative credit for an unusually good past broadcast record.

³ Likewise, we reject Playa's contention that the addition of a financial issue is appropriate because Rienstra stated that one of FEM Ray's stockholders had decided to withdraw as an active participant for financial reasons. The testimony Playa relies on in this regard indicates that the stockholder has paid FEM Ray \$1,000, has committed to a loan for \$1,000 more, and that FEM Ray can ask the stockholder to honor the loan commitment if the funds are necessary. Tr. 938-40. Absent affidavits or documentation raising a substantial and material question of fact concerning the need for this investor's remaining \$1,000 commitment, Playa's allegations are based on speculation and do not warrant further consideration. See *Washoe Shoshone Broadcasting*, 5 FCC Rcd 5561, 5562 ¶ 10 (1990). Playa also contends that FEM Ray's financial qualifications are in question because another of its stockholders is involved in a bankruptcy and is a

defendant in a civil suit based on breach of contract, fraud in the sale of securities and RICO. However, Playa has not demonstrated that the fact of the bankruptcy and lawsuit have affected FEM Ray's financial qualifications. FEM Ray asserts that this stockholder has satisfied her financial commitment, and Playa offers no evidence disputing this assertion. See Rienstra declaration, July 18, 1990, ¶ 7. Furthermore, to the extent that Playa suggests that FEM Ray had an obligation to report the pending lawsuit, we note that Playa has not demonstrated that the outcome of the litigation would make a material difference in FEM Ray's finances or would be of decisional significance in determining FEM Ray's qualifications to be a Commission licensee. See *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990); *Policy Regarding Character Qualification in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. Jun. 11, 1987); *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1020 ¶ 7 (Rev. Bd. 1981).